IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-318

HOWARD B. LEVY,
Petitioner,

vs.

JACOB J. PARKER, as Warden of the United States Penitentiary, Lewisburg, Pennsylvania, and STANLEY R. RESOR, as Secretary of the Army,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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JACOB J. PARKER, as Warden of the United States Penitentiary, Lewisburg, Pennsylvania, and STANLEY R. RESOR, as Secretary of the Army,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Howard B. Levy respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 5, 1974.

OPINIONS BELOW

The opinion of the court of appeals which is the subject of this petition is not yet reported and appears in the Opinions Appendix, infra, at 1oa. The previous opinion of the court of appeals

is reported at 478 F.2d 772. The opinion of the United States District Court for the Middle District of Pennsylvania relating to the G-2 dossier and other undisclosed Government information is reported at 316 F. Supp. 473, and appears in the Opinions Appendix, infra, at 5oa. The June 30, 1971 opinion of the district court is unreported and appears in the Opinions Appendix, infra, at 23oa. The prior opinion of this Court Parker v. Levy, No. 73-206, June 19, 1974, is reported at 94 S.Ct. 2547.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 5, 1974. This petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

I. Whether the refusal of the Government to allow access by a court-martial defendant's civilian counsel to G-2 dossier classified material upon which the court-martial was based deprived petitioner of fifth and sixth amendment rights including due process, confrontation and the effective assistance of counsel and first and fourth amendment rights as well; and whether the refusal of the Government to disclose information procured from 450 witness questionnaires the answers to which were potentially helpful to the defense; and whether the denial of petitioner's motion for disclosure of information obtained by eaves-

dropping, also unconstitutionally deprived petitioner of first, fourth, fifth and sixth amendment rights.

II. Whether in a prosecution for pure speech under Articles 133 and 134, UCMJ, the truth of the words spoken must be allowed as a defense.

III. Whether the district court's judgment that "the record supports a finding of a clear and present danger of creating the harmful results, with the requisite intent, as charged" which failed to recognize that the clear and present danger test was not the standard of proof employed by the court-martial, that instead a "reasonable tendency test" was employed and that "the harmful results as charged" never occurred and there was a total failure of review by the district court coupled with the nonexistance of evidence to prove the necessary elements of the speech charges requires reversal.

IV. Whether the refusal to sever the pure speech charges from the order charge deprived petitioner of a fair trial where they required inconsistent proof and the inflammatory and controversial political views upon which the speech charges were based prejudiced or precluded a defense to the order charge and deprived petitioner of the right to testify against the order charge.

V. Whether petitioner was denied a fair and impartial trial by the military justice system as a result of court-martial member selection procedures; pretrial, trial and post-trial procedures

including the Article 32 pre-trial investigation, the prosecutor's status within the military justice system which provides him a preferred insider advantage over defense counsel, and the role of the staff judge advocate in said system; and the refusal to change venue from Fort Jackson, South Carolina.

VI. Whether petitioner's defense to the charge of willful disobedience of a lawful command which challenged the legality of the command on the ground that obedience would have required him to commit war crimes was erroneously disallowed by the law officer who in 1967 (prior to the arrest of Special Forces personnel on war crimes charges resulting from the illegal use of medicine, the release of the Pentagon Papers, and the now but not then known and undiscoverable evidence of war crimes) ruled there was no evidence of war crimes.

VII. Whether petitioner's prosecution was selective and politically and racially based, involved racially and politically prejudicial pre-trial actions by Government agents and resulted in an unequal application of military law.

STATEMENT OF THE CASE

Petitioner, Dr. Howard B. Levy, then a Captain in the United States Army, was tried and convicted for "conduct unbecoming an officer and a gentleman," Article 133, UCMJ, 10 U.S.C. §933, for violating the "General Article," Article 134, UCMJ, 10 U.S.C. §934, and for "willfully disobey[ing] a lawful command," Article 90, UCMJ, 10 U.S.C. §890.[1] Two of the five charges (the

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1. Dr. Levy was charged as follows: Charge I, Article 90 (for disobedience of order to train Special Forces personnel); Charge II, Article 134 (for statements to enlisted men about the war in Vietnam designed to promote disloyalty and disaffection among the troops); Additional Charge I, Article 133 (for making intemperate, defamatory, provoking and disloyal statements to divers persons at divers times constituting conduct unbecoming an officer and a gentleman); Additional Charge II, Article 133 (for writing a letter to a sergeant critical of American involvement in Vietnam constituting conduct unbecoming an officer and a gentleman); Additional Charge III, Article 134 (for writing a letter to a sergeant with intent to cause disloyalty). The Article 90 Charge is found at R. Vol. 1, p. 2. See also A. 30. Charge II and Additional Charges I through III are set out at R. Vol. 1, pp. 2, 6, 10-11. See also A. 31-32, 42-43. This case was recently before the Court sub nom. Parker v.
(footnote continued on next page)

"letter charges") were dismissed at the request of the prosecutor after the court had found Dr. Levy guilty, the law officer instructing the court "not to consider those [letter charges] in any way and then dismiss [them] from your mind in deliberating upon and deciding the sentence in this case." A. 648.

Dr. Levy's sentence by concurrence of "two-thirds of the members present at the time the vote was taken" was general and not severable as to the specific charges against him. The sentence was dismissal from the service, forfeiture of all pay and allowances and confinement at hard labor for three years. A. 651.

Four of the five charges, including the letter charges--all Article 133 and 134 charges (sometimes collectively referred to as "the speech charges")--were based on pure speech, no conduct being alleged or proved. The other charge (the Article 90 charge sometimes

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(footnote continued from preceding page) Levy, October Term 1973, No. 73-206. Record references herein are to the certified record therein. A motion to use that record was filed simultaneously with this petition. The following abbreviations are employed herein: for the more often referred to three-volume xeroxed Parker v. Levy, supra, Appendix, "A"; and for the Record of the Court-Martial, "R. Vol. ____, p. ____."

referred to as "the order charge") was based on Dr. Levy's refusal to obey an order to provide medical training to Special Forces Aidmen whom he contended would be involved in the commission of war crimes.

The Intelligence Investigation

Dr. Levy entered active duty on July 9, 1965 under the "Berry Plan."[1] He was assigned to the United States Army Hospital, Fort Jackson, South Carolina, as Chief of Dermatology.

On July 17, 1965, Dr. Levy began participating in an off-duty, out-of-uniform Negro voter registration canvass in nearby Newberry County, South Carolina.

On July 19, 1965, someone made the following entry on a sheet of yellow legal-sized paper in Dr. Levy's personnel file: "Determine whetver [sic] a loyalty investigation should be made 19 July, 1965." A. 1146.

A civilian Army intelligence investigator (who resided in Prosperity, Newberry County, South Carolina) (the "Special Agent") commenced an investigation of Dr. Levy, the disclosed portion

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1. Under the "Berry Plan" physicians were deferred temporarily from the draft and permitted to complete medical training prior to service of two years in the armed forces.

of that investigation (the "G-2 dossier") containing Dr. Levy's statements that he was "...in accord with the democratic form of government as outlined in the Constitution of the United States, even though I disagree with much of the method and policy that the U.S. Government sometimes pursues," A. 761; describing his own "political beliefs as being liberal left," A. 766; and setting forth the following:

> I am not a pacifist; however, I do have certain pacifistic leanings. I am able to envision situations in which I could conceivably refuse to obey a military order given me by a commander. This would be in such a situation in which I felt that the order was ethically or morally incorrect. I would add that this cannot be a criteria of loyalty inasmuch as in such an unusual situation it might be more loyal not to obey the order. There is ample historical evidence to suggest that this has sometimes turned out to be the case. I don't think that one can honestly predict such a response in advance of the specific situation. A. 767. [Emphasis added.]

The Special Agent said he began looking "into" Dr. Levy during the summer of 1965. A. 887-88. He said he kept no notes.[1]

The Special Agent was engaged in the following colloguy:

> Q. Did you make any investigation of Capt. Levy relating to his activities on affairs around South Carolina?
>
> Col. Severin: Do you mean in the city as opposed to out here at

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1. The following transpired:

Q. You don't keep any notes. [He did take handwritten notes, A. 611, 953(a).]

A. No, our notes are destroyed in our office. We have only a field office. My office is in Atlanta and they are destroyed after thirty days after the report goes in after they see them here.

Q. Where did you get that information that is on here, on these notes you are referring to?

A. I got the information from my agent's report. I have burned copies of them now. A. 611-12.

the military?

Q. (By Mr. Morgan) Non-military, yes.

A. I did not myself.

Q. Do you know whether or not someone else did?

A. I cannot answer that. I had better delay answering that until I can see, because this possibly could be a security matter. I do not have that. I do not know that.

Q. Well, now, I am not asking you whether or not someone else did at this point. I am asking you whether or not you know whether or not someone did?

A. Well, I will have to decline to answer that.

Q. As to even whether you have knowledge of whether someone else did?

A. Right.

Mr. Morgan: At this point we request that the witness be instructed to answer the question.

> Capt. Shusterman: Sir, I think this relates to certain matters that provide the basis for the classification that we have in the dossier, and apparently there are certain operational techniques and operations by certain other agencies that may be classified . . . A. 855-56.

Over fifth and sixth amendment contentions, the Special Agent was allowed to remain silent. A. 856-57.

The Letter

On September 10, 1965, Dr. Levy wrote an eight-page letter expressing his views on American foreign and domestic policy to a career military intelligence sergeant (eight years in the Army, R. Vol. 6, p. 1061) who was then stationed in South Vietnam. William J. Treanor, a white civilian who was in charge of the Newberry County voter registration campaign, had served in military intelligence with the sergeant, R. Vol. 8, p. 1058, and, since his discharge, he and the sergeant had been "corresponding fairly regularly." Id. at 1059. While staying at Dr. Levy's apartment, Mr. Treanor, responding to the sergeant's last letter, wrote telling him of his voter registration work and commenting on the letter he had previously received. Id. The sergeant's letter had told of "the way he felt about the war and the involvement there and what-not." Id. at 1060. The sergeant "believed that many people in the United States didn't really understand the sit-

uation as well as he thought he understood it." Id. at 1064. Treanor "thought it would be to a better understanding between two people I know to be very concerned about would affairs," id. at 1065, and testified that Dr. Levy "was invited by me to write the letter and so he sat down and did so." Id. at 1059. The letter itself did not disclose that Dr. Levy was an Army officer.[1]

The prosecutor had relied on the letter, which was the sole basis for the two letter charges, by referring to and quoting from it during closing argument.[2] R. Vol. 9, pp. 2554-56.

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1. For the full text of the letter and a complete discussion of the circumstances of its writing see R. Vol. 6, pp. 1056-68, and A. 653-60.

2. For example:
"But why must I fight it for you? The same people who suppress Negroes and poor whites here are doing it all over again, all over the world, and you are helping them. You, Sergeant Hancock. You are no better than a killer. Why? No doubt you know about the terror the whites have inflicted upon the Negroes in our country. Aren't you guilty of the same thing with regard to the Vietnamese? A dead woman is a dead

(footnote continued on next page)

During the year 1966, Dr. Levy engaged in private and casual conversation with Army personnel, enlisted men and officers, expressing disagreement with American foreign policy in general and Vietnam policy in particular. He critically discussed what he believed to be national and South Carolina policy regarding the rights of black citizens. Dr. Levy was accused in Additional Charge I of saying that Special Forces personnel were "liars and thieves," "killers of peasants," and "murderers of women and children." He was also accused of saying that "the United States is wrong in being involved in the Viet Nam War," that he

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(footnote continued from preceeding page)

> woman in Alabama and in Vietnam. To destroy a child's life in Vietnam equals a destroyed life in Harlem. For what cause?" And a series of epithets. Bull shit. This is a dialogue as the defense suggested? This is a calculated design. Gentleman of the court, the Government's position in this case is not a position that says that Captain Levy cannot express opposition to the United States war effort, we are discussing. Everyone is entitled to his opinion. This is more than that. That letter is a calculated designed effort to affect one man he knew about who is in Vietnam . . . R. Vol. 9, p. 2556.

would not serve in the war if ordered, and that "colored soldiers" were discriminated against and should not serve in the war. His words were described in Additional Charge I as being "intemperate," "defamatory," "provoking," "disloyal," "contemptuous" and "disrespectful." In Charge II it was charged that he did, "with design to promote disloyalty and disaffection among the troops, publicly utter ... statements to divers enlisted personnel at divers times" "which statements were disloyal to the Untied States, and prejudicial to good order and discipline in the armed forces." Dr. Levy offered to defend the speech charges on the grounds of the truth of the statements made. The law officer, however, ruled that the truth of the statements was irrelevant. A. 464-66.

The Bringing of the Charges

Colonel Henry Franklin Fancy assumed the hospital command in mid-1966. During his first conversation with his executive officer about Dr. Levy the following transpired.

> . . .Colonel Fancy told me his [Dr. Levy's] file was flagged and, I said, for what? And, he said, "Pinko" and that is all the conversation there was. A. 1029-30.

Of the 600 men under his command only Dr. Levy's file was flagged.[1]

Dr. Levy was "the first confrontation" Colonel Fancy "had ever had with a person . . . who had, in effect, been accused of being or was suspected of being a Communist." A. 798. It was a "rather shocking occurrence." Id.

On October 2, 1966, the Special Agent went to the office of Colonel Fancy. Colonel Fancy's G-2 dossier statement relates:

I was not informed or aware of any

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1. "Flagging" a personnel file results in non-promotion and non-transfer of the officer. This is an administrative action of which the affected officer has no knowledge. Regarding the seriousness of the action see A. 1072-84. But see A. 1012-18, regarding one other officer whose file was "flagged" due to membership in a "subversive" organization. His dossier also was read by Col. Fancy's executive officer. A. 1042. But Colonel Fancy didn't seem to know of him. A. 1079. As the matter was later clarified the other officer was merely under investigation (not "flagged") because he had been to "some meetings" but was not a member of the "civil rights group" ". . .which ha[d] demonstrated against the war in Viet Nam and, which has worked with the Negro in the South and ordered demonstrations and marches in Selma at that time." A. 1123. See also A. 1122-28.

> difficulties encountered by Special Forces medical personnel in the Dermatology Section until the week of 2 October 1966. A. 681.

At that first meeting the Special Agent ". . .said that Capt. Levy had attended certain meetings in New York City and that the apparent organization behind these meetings were [sic] suspect in some way." A. 796-97. "[H]e said they possibly had some association with Communism. This was the suspicion, of course. . .," A. 797, and he told Colonel Fancy "that Capt. Levy had been having some dealings with the negro [sic] personnel, which. . . were of an unpatriotic nature. . ."[1] A. 801-802.

The Special Agent did not directly raise the question of Dr. Levy's civil rights and voter registration activities at that time:

> Other than the statement that the Special Agent made that there was some indication that Capt. Levy was

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1. The Special Agent denied providing Colonel Fancy any information. "I do not give any information I receive," he said. "I do not divulge the sources in talking to him at that time or anytime."

He did acknowledge asking ". . .questions and anyone intelligent, such as Colonel Fancy, can deduct from the questions I ask what I am getting at insofar as the questions I am asking. Insofar as telling the Colonel that he is this, he is that, or who said this, I do not do that." A. 861.

> discussing with negros [sic] their duty performance in other areas. . . and that Capt. Levy was possibly talking to them on certain rather unpatriotic terms. This is the impression that I recall having when he told me this. A. 800-01.

On October 11, 1966, following these visits from the Special Agent, Colonel Fancy ordered Dr. Levy to provide Special Forces Aidmen ten hours of training in dermatology. Although he trained all other military medical and para-medical personnel in dermatology, Dr. Levy declined the order on ethical grounds.

The G-2 Dossier

Demands were made for the entire 180 page dossier (100 pages of which were never provided) on the grounds of the fifth and sixth amendments, the rights to due process, confrontation, knowledge of the nature and cause of the accusation, and effective counsel. Military counsel assisting in the case was placed ". . .in a position also of a conflict somewhat akin to that of Capt. Levy [regarding protection of patients' confidences from Special Forces Aidmen], in that Army regulations, of course, require him to maintain the secrecy of matters in the dossier, while at the same time his duty as an attorney to his client requires a full disclosure to his client of all matters and facts that come into his possession and knowledge." A. 841. See Exh. C. 50. Fourth amendment grounds were also later invoked, A. 833, as were other constitutional demands arising from the first and ninth amendments. At every opportunity the Government contended that the defense was not entitled to discover its intelligence "techniques."

See, e.g., testimony of the Special Agent, A. 856-77.

Colonel Fancy initiated Article 15, UCMJ, 10 U.S.C. §815 (minor non-judicial punishment[1]), proceedings against Dr. Levy. In the "middle" of December, 1966, "[t]he G-2 dossier became available" to Colonel Fancy. He "revised" his "estimate of the situation."

Q. In what way?

A. At that time I was contemplating action under Article 15 because of dereliction in duty. As a result of reviewing the dossier and talking with the Judge Advocate, I felt the charges of a more serious nature were present.

Q. You ordinarily would have dealt with this as a dereliction of duty problem, wouldn't you?

A. Up to that point.

Q. What was it about the dossier that made it seem more serious than an Article 15 offense to you?

A. There were certain documents of a confidential nature contained

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1. The maximum being a withholding of privileges, suspension of pay and duty and restriction to limits but in none of these events for more than one-half month.

> therein which indicated problems of a possibly serious nature with other personnel. A. 808-09. See also A. 1052-53.

Colonel Fancy had previously talked about the matter with Colonel Rawlins, his personnel officer, who had told him

> ...there were certain records primarily in the hands of the CID or CIC...
>
> . . . .
>
> CIC, and I told him I didn't know any of the particulars, but I knew there was certain undertow around the area that he should be looking towards that end of it, too. A. 813.

and Colonel Rawlins' "loyalty" and "security" evaluation of Dr. Levy was also based solely on the Counter-Intelligence Corps' files. Id. The complete G-2 dossier was "unavailable" to Chief Defense Counsel. A. 809-10, 812, 814-19, 829-45.

Colonel Fancy had others read the dossier. As his executive officer put it, "[h]e just up and suggested that I go read it." A. 1042.

> Q. Well, he didn't suggest that just as a part of your regular reading program?
>
> A. I think so.

Q. Was there no given reason that you were to read this?

A. No sir. Id.

To Colonel Fancy, Dr. Levy:

1. Was a "pinko" or "communist." A. 796-99.

2. Then, on February 17, 1967, he was not a Communist--"I was worried about it for a while, but the C.I.C. conducted a thorough investigation and it is my recollection that they determined that he was not a communist." A. 1185.[1]

3. Then at the trial the following transpired:

Q. It wasn't until February that you discovered that he wasn't a Communist, was it, February of this year?

A. I have to my knowledge not yet discovered that fact.

Q. I thought you said he got a clearance at your last--I thought when you were testifying?

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1. On February 17, 1967, he was as "...certain that insofar as humanly possible he had been cleared as being a member of the communist party." A.423(h).

A. Yes, sir, I know what you mean and I thought I had a clearance, but, I have subsequently been told that I have not had clearance.

Q. Well, that day you knew that he wasn't?

A. Yes, sir.

Q. And today you're note sure again?

A. Today I believe he has not yet been, I know he has not yet been cleared by this National Agency check. A. 398.[1]

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1. Had Dr. Levy been proceeded against under 10 U.S.C. §3791 which provides for convening a board"...to determine whether [an officer] shall be required, because of moral dereliction, professional dereliction, or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on the active list," (emphasis added), he would have been "...allowed full access to, and furnished copies of records relevant to his case at all stages of the proceeding, except that a board shall withhold any records that the Secretary determines should be withheld in the interests of national security." 10 U.S.C. §3795(4).

(footnote continued on following page)

Colonel Fancy agreed that he "... obtained all my information on Captain Levy's possible previous political beliefs from reviewing a G-2 dossier and listening to questions from military intelligence agents." A. 423(h).

(footnote continued from previous page)

Where records are withheld the officer "...shall, to the extent that the national security permits, be furnished a summary of the records so withheld." 10 U.S.C. §3795. During these proceedings no national security interest was claimed.

War Crimes

The law officer ruled that the truth of Dr. Levy's words was irrelevant to the speech charges and provided no defense to them. But he also ruled that truth of the words "Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children" would show war crimes and therefore present a Nuremberg defense to the order charge. Petitioner was denied the right of Vietnam discovery and was denied the right to subpoena Special Forces personnel stationed there.

Despite this Dr. Levy elicited proof under The Law of Land Warfare, Field Manual (FM) 27-10 (1956), and the proof so elicited was specific and included the testimony of witnesses who actually had been in a majority of the Special Forces A-Team encampments in South Vietnam and knew the patterns and practices there. See R. Vol. 5, pp. 959, 991-92, R. Vol. 6, p. 1021. See also A. 508-17, R. Vol. 6, pp. 1011-26, A. 504 and R. Vol. 5, pp. 991-96. For documentation of more than 3,000 then known war crimes see R. Vol. 17, Appellate Exhibits 19A-19E also reproduced at A. 158-293.

Then the law officer ruled:

> ...I know of no court, civilian or military, that is going to sit in judgment on the President's exercise of his power in disposing the troops of the United States. Disposition of troops

> under our constitution is peculiarily [sic] an executive power and not a judicial one. A. 466.
>
> While there have been perhaps instances of needless brutality in this struggle in Vietnam about which the accused may have learned either through conversations or through publications, my conclusion is that there is no evidence that would render this order to train aidmen illegal on the grounds that eventually these men would become engaged in war crimes or in some way prostitute their medical training [the testimony on the medical ethics defense came later] by employing it in crimes against humanity. A. 523.

The law officer did not rule that Special Forces were or were not, in fact, engaged in the commission of war crimes. He simply refused to allow the defense, which he had previously ruled valid, to go to the court.

Military Justice

Dr. Levy contended that the military justice system could not provide him a fair trial, objected to specific military trial procedures and moved to change venue. He contended that:

> A. Court-martial selection procedures were unconstitutionally discriminatory. The following groups

were excluded from Dr. Levy's court-martial panel:

(1) Non-career personnel.[1]
(2) Enlisted men.[1]
(3) Officers equal to or lower in rank than Dr. Levy.[1]
(4) Medical personnel.[2]
(5) Women.[3]

Timely motions were made to quash the court-martial panel on

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1. Article 25(d)(1), UCMJ provides: When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is a junior to him in rank or grade.

2. AR 40-1, ¶9-B provides in part: Except when regulatins specifically stipualte to the contrary, such officers [members of the medical corps] will not be detailed as members of courts-martial. . .

3. There were no women summoned for service on Dr. Levy's court martial. He offered to prove in addition that during the preceding fifteen years no woman had ever been a member of a general court-martial at Fort Jackson. R. Vol. 3, pp. 138-45, 208, 213-14. Many of the patients whose ailments were to be displayed during Special Forces training were women.

the grounds of exclusion of each of these groups, which motions were denied. R. Vol. 3, pp. 36-38, 208.

B. The unfairness of discriminatory "jury" selection procedures in the military is enhanced because:

(1) The "jury" may convict by a two-thirds vote.[1]

(2) Each side has only one peremptory challenge.[2]

(3) Challenges for cause are heard and voted on by the challenged officer's fellow court members.[3]

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1. Conviction for all non-capital offenses may be had upon "the concurrence of two-thirds of the members present at the time the vote is taken." Art. 52 (a)(2), UCMJ.

2. Art. 41, UCMJ provides:
(b) Each accused and the trial counsel is entitled to one peremptory challenge, but the law officer may not be challenged except for cause.

3. At the time of Dr. Levy's court-martial Art. 41, UCMJ provided:
(a) Members of a general or special court-martial and the law officer of a general court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The court shall determine

(footnote continued on next page)

While he objected to the Article 41 procedures, rather than risk antagonizing his self-qualifying court-martial, Dr. Levy made no challenges. R. Vol. 3, pp. 42-43. His non-exercise of the one peremptory challenge allowed him to keep the number of votes of court members required for conviction at seven. Had he exercised his permitted challenge to one of the ten panel members only six conviction votes (two-thirds of nine) would have been necessary.

C. The Article 32 investigating officer in this case was appointed by the convening authority and thus was subject to the same command influence as the members of the court-martial.[1] In addition, the press

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(footnote continued from preceding page)

> the relevancy and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

Article 41 was amended on October 24, 1968, so that now the "military judge, or, if none, the court, shall determine the relevancy and validity of challenges for cause. . ."

1. Appellee's objections are noted at R. Vol. 3, pp. 44, 46-7. Article 32 (footnote continued on next page)

was excluded from the Article 32 investigation in the absence of a showing of any legitimate governmental interest such as prevention of disclosure of classified information.

D. The prosecutor served as a sort of clerk, bailiff, district attorney, sheriff, amicus, *custodian*, and special investigator, as he does in all courts-martial. The prosecutor administers oaths (he even swears in the law officer, now military judge) and issues subpoenas (his own and those of the defense, unless he decides he doesn't want to issue the defense subpoenas, in which case he requires the defense to tell the General who convened the court-martial in the first place why they are relevant).[1]

(footnote continued from preceding page) provides:

> (a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

1. See MCM, §115a (1969).

He sends notices to the court, takes muster when the court convenes, announces the appointing order, and generally, serves as the man upon whom the court-martial can safely rely. He identifies witnesses, swears them in and has them point the accusing (identifying) finger at the defendant.[1]

E. The Staff Judge Advocate, the General's lawyer, appoints both the prosecution and defense counsel, helps draft charges, advises the General, no doubt helps select court members, and at the conclusion of the trial makes recommendations to the General.[2] In this case his presence permeates the Record. See, e.g., R. Vol. 2, report of 1 March 1967 Exh. 2, p. 22; id. Exh. 3, p. 2; id. Vol. 13, App. Exh. 7, pp. 310-11, 387, 711; R. Volumes 13-15, 19, passim.

F. The atmosphere at Fort Jackson required that Dr. Levy's request for a change of venue be granted. R. Vol. 7, pp. 2242-47. Major

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1. Dr. Levy's objections to the preferred "insiders" role of the prosecutor were overruled. R. Vol. 3, pp. 38-40, 51-56; R. Vol. 7, p. 2248.

2. Dr. Levy's objections to the multiple roles played by the Staff Judge Advocate were overruled. R. Vol. 3, pp. 46-47.

Parsons, a court-martial member, who had lost the sight of one eye in a mine field in Vietnam, was threatened on the night before the deliberations began. R. Vol. 9, pp. 2632-33. A physician witness attempted to take the fifth amendment because he feared the "military law"; he feared the Army's power to send him to Vietnam if he testified adversely to Army interests. R. Vol. 6, pp. 2090, 2094, 2100-01. Another defense witness, a Fort Jackson physician, felt the mood and knew the pressure, R. Vol. 7, pp. 2181-82, and had, in fact, been threatened by an enlisted man who thought he was Dr. Levy. Id. Additionally, during trial the public information officer circulated to the press a brochure discrediting a defense witness. R. Vol. 7, pp. 2246-48.

Following the conviction and June 3, 1967, sentencing,[1] Dr. Levy exhausted his military procedures[2] and then filed a petition for writ of habeas corpus in the

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1. On August 2, 1969, Mr. Justice Douglas ordered Dr. Levy released on Bail pending habeas corpus. Levy v. Parker, 396 U.S. 1204 (1969). On October 13, 1969, this Court unanimously agreed. Levy v. Parker, 396 U.S. 804 (1969).

2. United States v. Levy, C.M. 416, 463, 39 C.M.R. 672 (ABR 1968), petition

(footnote continued on next page)

United States District Court for the Middle District of Pennsylvania. The petition was denied on June 30, 1971. See Opinions Appendix, infra, at 23oa.

He appealed to the United States Court of Appeals for the Third Circuit. On April 18, 1973, the court of appeals reversed the district court, holding Articles 133 and 134 unconstitutional and reversing the Article 90 conviction for prejudicial joinder.

This court reversed holding that Article 133 and 134 of the UCMJ were not unconstitutional. The case was remanded to the court of appeals to determine in the first instance issues properly raised by petitioner in that court but not treated in the court of appeals' original opinion. On August 5, 1974, the court of appeals entered a Judgment Order on Remand that the judgment of the district court be affirmed in all respects, specifi-

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(footnote continued from preceding page) for review denied, No. 21,641, 18 U.S.C. M.A. 627 (1969). Other proceedings are reported as follows: Levy v. Corcoran, 389 F.2d 929 (D.C. Cir. 1967), stay and cert. denied, 387 U.S. 915, 389 U.S. 960 (1967) (sought to enjoin conduct of court-martial); Levy v. Resor, 17 U.S.C. M.A. 135, 37 C.M.R. 399 (1967); Levy v. Resor, Civ. No. 67-442 (D. S.C. July 5, 1967), aff'd per curiam, 384 F.2d 689 (4th Cir. 1967), cert. denied, 389 U.S. 1049 (1968) (sought bail pending intra-military appellate review); Levy v. Dillon, 286 F.Supp. 593 (D. Kan. 1968), aff'd, 415 F.2d 1263 (10th Cir. 1969) (regarding relief while incarcerated at United States Disciplinary Barracks pending intra-military appellate review).

cally citing and ruling upon each of the issues raised in the court of appeals but not previously considered by it. Opinions Appendix, infra, at loa.

REASONS FOR GRANTING THE WRIT

I. This petition for writ of certiorari presents a question similar to one pending in McLucas v. DeChamplain, No. 73-1346:

> Did [the] federal district court properly invalidate restrictions on access to classified documents and their use placed upon court martial defendant's civilian counsel? 42 U.S.L.W. 3701 (the case reported sub nom. DeChamplain v. McLucas, 367 F. Supp. 1291 (D.D.C. 1973)).

Oral argument in McLucas is set for December 17, 1974.

The necessity for Supreme Court review in this case is compelling since the absolute denial to a court-martial defendant's civilian counsel of access to a G-2 dossier classified "confidential" and other evidence potentially helpful to the defense is at issue.

Colonel Fancy, Dr. Levy's accuser, and a trial witness against him, decided that Dr. Levy's failure to instruct Special Forces aidmen warranted minor Article 15 non-judicial punishment. He was, however, subsequently called to the Judge Advocate General's Office where he "...reviewed the G-2 dossier..." and "...felt that the wrongdoing was of a greater nature than should be punished by an Arti-

cle 15 and it was my feeling at that time that a court-martial was indicated."[1] A. 396.

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1. Q: But, you didn't decide to move forward until you read the G-2 dossier again, right? On the Court-martial?

A: Yes, sir.

Q: Consequently the elevation of the Charge I from the Article 15 to Article 90 violation was based on reading the G-2 dossier wasn't it?

A: In large part, yes, sir. A. 397-98 (emphasis added).

Colonel Fancy's interpretation of the dossier seems clear:

> Q: ...According to testimony received here yesterday, which was made by Colonel Davis, and I quote exactly. You entered and you said that, "His records are flagged." And, then, your quote was, "Pinko." What do you mean by the word "Pinko."
>
> A: This is a slang term that refers to someone who tends to fol-

(footnote continued on following page)

The dossier transformed the proceedings from the potential wrist-slap punishment of an Article 15 non-judicial proceeding to a full scale trial by court-martial, an eleven-year prison potential, discharge from the service, a wrecked professional career, and an actual sentence to three years at hard labor.

(footnote continued from preceding page)

> low communist beliefs, in an off-hand definition.
>
> Q: Fine, so, you have knowledge of at least some facts at the time that you told Colonel Davis that Levy's file was flagged, "Pinko," right?
>
> A: I had knowledge of something. A. 1085.

And:

> I obtained all my information on Captain Levy's possible previous political beliefs from reviewing a G-2 dossier and listening to questions from military intelligence agents. A. 423(h).

The prosecutor reviewed the entire dossier, R. Vol. 3, p. 86, the law officer reviewed it in camera after, in effect, obtaining prosecutorial permission, id., and assistant military defense counsel was allowed to review it. Everyone saw the dossier but the two men most in need of it -- the defendant and his chief counsel.

Refusing to allow civilian counsel to examine the entire dossier, even though appointed military defense counsel (chosen not by the defendant but by the Government) viewed the dossier, denied Dr. Levy effective assistance of counsel. See Brady v. Maryland, 373 U.S. 83 (1963); Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. State of Kansas, 317 U.S. 213 (1942). Compare: McLucas v. DeChamplain, No. 73-1346, 42 U.S.L.W. 3702.

The argument at the court-martial -- that different lawyers look at different things different ways, that the two people who knew the most about the defense were Dr. Levy and his civilian counsel, and that some lawyers are more experienced than others -- was to no avail.

There are two arguments supporting the Government's refusal: (1) security matters were involved and civilian counsel should not be allowed to see the dossier; and (2) the defense is not entitled to the Government's case. The first point is without merit. The dossier con-

tains matters with a security status no higher than "confidential." Exh. C to the Petition for Writ of Habeas Corpus, p. 50. Dr. Levy's chief defense counsel could probably have secured a security clearance at the time of the court-martial and suggested that solution. He was provided clearance to view the entirety of the transcript in a later case arising in Vietnam involving allegations of murder by a Special Forces officer, portions of which were classified "top secret." Id. at 121-22. Moreover, had the file in fact contained security matters which precluded disclosure to the accused and his civilian counsel, under the circumstances of this case the Government should have chosen between non-disclosure and prosecution. It cannot choose both. United States v. Andolschek, 142 F.2d 503, 506 (2nd Cir. 1944).

By permitting military defense counsel to examine the dossier, the Government waived any objection that the defense was not entitled to the Government's case. The Government's decision in this respect is very strange. It let one lawyer review the dossier and not the others. Since it did this for other than security reasons, the only likely reason is that it sought to protect the Record so that it could later make the argument that the defense had this information. But allowing the Government to select which counsel shall view the evidence is a concept

new to criminal defense.[1]

Dr. Levy was entitled to the adequate assistance of civilian counsel, yet his chosen lawyer was not allowed to see most of the very dossier which was the basis of the charges and their upgrading. It having been alleged by the defense that the charges were based in part on Dr. Levy's pre-service activity, cf. Harmon v. Brucker, 355 U.S. 579 (1958), and his racial and political views, United States v. McLeod, 385 F.2d 734 (5th Cir. 1967); Lenske v. United States, 383 F.2d 20 (9th Cir. 1967), the refusal to permit civilian defense counsel to view the dossier violated Dr. Levy's first, fourth, fifth and sixth amendment rights.

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1. Even if the disclosure to the military defense counsel could be construed to give sufficient information to civilian counsel, the Record does not support this. Military defense counsel was not allowed to reveal what he had seen. He requested certain items but was told he could not get others so he did not request them. A. 351. The prosecution agreed that military defense counsel was bound by Army Regulations to non-disclosure. Military counsel "could not reveal it to [civilian defense counsel] anymore than he could go look at it himself." Id.

The dossier may have contained illegally obtained matter. This should have been disclosed. Alderman v. United States, 394 U.S. 165 (1969); Wong Sun v. United States, 371 U.S. 471 (1963); Nardone v. United States, 302 U.S. 379 (1937) and 308 U.S. 338 (1939). If it contained evidence favorable to the accused, concealment was improper whether done in good or bad faith. Brady v. Maryland, 373 U.S. 83 (1963); Giles v. Maryland, 386 U.S. 66 (1967); Griffin v. United States, 336 U.S. 704 (1949), on remand, 183 F.2d 990 (D.C. Cir. 1950).

Additionally, the Government submitted questionnaires to approximately 450 persons, the names coming ostensibly from Dr. Levy's patient records. Of these 450 persons, 13 were called as witnesses, and the questionnaires of these 13 were turned over to the defense. Since the Government contended that Dr. Levy made statements to "divers" persons with a "design" in a "public" manner, the defense asked for the balance of the questionnaires to show that the Army could not find more than 13 people who heard such statements, and possibly to disprove the testimony of the 13 called as witnesses. The contents of these other questionnaires were totally unknown to the defense.

The Army refusal was based on the Jencks Act, 18 U.S.C. § 3500. That Act, however, requires only that the statements of witnesses be provided to the defense. Chief defense counsel for Dr. Levy spe-

cifically rejected the Jencks Act as the grounds for production of the documents, relying instead on constitutional guarantees, complying with the mandate of United States v. Augenblick, 393 U.S. 348 (1969). Compliance with the Jencks Act does not rid the Government of its duty not to withhold information helpful to the accused. Brady v. Maryland, 373 U.S. 83 (1963); Mooney v. Holohan, 294 U.S. 103 (1935); and Pyle v. State of Kansas, 317 U.S. 213 (1942).

The district court refused to make the questionnaires available because it felt they could not negate the remarks made to the 13 prosecution witnesses. But to constitute "evidence favorable to defendant," it has never been required that the evidence be clearly exonerating. It must only be favorable.

This Court also should consider the extent to which the Government should be required to disclose its efforts to ascertain whether or not evidence had been obtained by electronic surveillance. Dr. Levy moved under Rule 16 of the Federal Rules of Criminal Procedure for an order to permit counsel to inspect and copy all records, memoranda, and other writings, recordings or other electronic surveillance of Dr. Levy, his place of work or residence or any other place frequented by him. App. 47.

The district court denied the motion on the Government counsel's representation

that the Government obtained no information by eavesdropping. Counsel for Dr. Levy accepted this representation as given in good faith, but had reservations as to its accuracy due to the large number of people involved in the prosecution and the possibility that the sought information might not have come to the attention of this particular Government counsel. Levy v. Parker, 316 F. Supp. 473, 475 (M.D. Pa. 1970). Opinions Appendix, infra, at 8oa.

This Court should consider whether an order should have been entered requiring a thorough search of the records of the Defense Department, Fort Jackson, Military Intelligence and other appropriate military and civilian agencies including the Justice Department for evidence of any such surveillance. Additionally, should all personnel who assisted in the prosecution or investigation of this case have been inquired of as to their knowledge, if any, of such surveillance? And should the involved agencies have been required to disclose their search efforts to the district court and to counsel for Dr. Levy?

Petitioner was manifestly prejudiced by the Government's non-disclosure and withholding of evidence. This Court should determine whether conviction under such circumstances is constitutional.

II. The Court should consider whether the first amendment requires that the truth of statements be allowed as a defense to criminal charges based upon pure speech.

In its previous opinion, this Court recognized that the due process clause requires that criminal prosecutions be based on standards by which criminality can be ascertained. 94 S. Ct. at 2561. Certainly one defense for speech must be truth. Whether Dr. Levy believed his statements were true or whether they were in fact true was ruled absolutely irrelevant. A. 464-66, 475. More critically, the triers of fact, if they believed his statements to be true, might have refused to find his words "dishonorable" if that had been a defense allowed.

The charges lumped together the "liars and thieves" statement with "killers of peasants" and "murderers of women and children." And even the prosecution witnesses supported the truthfulness of the "liars and thieves" statement. Colonel Fancy testified that Dr. Levy had told him that Special Forces Aidmen had stolen items of equipment from his clinic. R. Vol. 4, p. 511. Special Forces' training coordinator verified that he had recovered from the students a photograph stolen from Dr. Levy and that Dr. Levy had complained to him that some instruments had been stolen by the students. R. Vol. 4, pp. 556-57.

This Court held that Dr. Levy "could have had no reasonable doubt that his published statements urging Negro enlisted men not to go to Vietnam if ordered to do so" was proscribed by the General Articles. 94 S. Ct. at 2562. But he was also charged with saying that "Special Forces are liars and

thieves, killers of peasants, and murderers of women and children." The court of appeals had found that this statement might not be within the examples in the Manual. Quoted, 94 S. Ct. at 2561. Thus no court has ruled that this statement is a proper basis for conviction, let alone whether the truth of the statement is a defense.

Additionally, the Court should determine whether the refusal of the law officer to allow the war crimes defense to be heard by the court-martial divested the court-martial of jurisdiction. Whelchel v. McDonald, 340 U.S. 122 (1950). For after the law officer held that proof of the truth of the statement "Special Forces are liars and thieves, killers of peasants, and murderers of women and children" would provide Dr. Levy a valid Nuremberg defense to the order charge, he conducted an out-of-court hearing on the evidence. Dr. Levy offered "some evidence" which made submission of the war crimes defense to the court-martial mandatory. See United States v. Evans, 17 U.S.C.M.A. 238, 38 C.M.R. 36 (1967); United States v. Moore, 16 U.S.C.M.A. 375, 36 C.M.R. 531 (1966); and United States v. Kuefler, 14 U.S.C.M.A. 136, 33 C.M.R. 348 (1963).

An additional question encompassed herein is the legal validity of the war crimes defense. The question remains open two undeclared wars after In Re Yamashita, 327 U.S. 1 (1946). Counsel knows of no other case, including William L. Calley, Jr. v. Howard H. Callaway, ___ F. Supp. ___ (M.D. Ga. 1974) (C.A. No. 74-7-COL., Sept. 25, 1974), which involves this question.

Dr. Levy was also charged with saying, "The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey." App. 8. Thus Dr. Levy was convicted for conduct unbecoming an officer and a gentleman and violation of the General Article apparently for telling the exact and precise truth in response to a question. See R. Vol. 4, pp. 531-32, 545.

Since the court-martial returned a general verdict, Dr. Levy may have been found guilty of uttering a statement clearly subject to the defense of truth. Therefore the Court should consider whether his conviction should be reversed under Terminiello v. Chicago, 337 U.S. 1 (1949); Street v. New York, 394 U.S. 576 (1969).

III. This Court should determine whether to reverse the lower court's ruling that the Record was supported by a finding of clear and present danger when the test employed by the court-martial was not a clear and present danger test but instead was a "reasonable tendency" test.

The district court found that "the record supports a finding of a clear and present danger of creating the harmful results, with the requisite intent, as charged." 25oa. This was appealed as being clearly erroneous since the law officer's charge did not require a finding of a clear and present danger. The court of appeals affirmed on remand.

Since this is a habeas corpus proceeding factfinding is of constitutional significance. Thus, this Court should consider whether to reverse the clearly erroneous findings of the district court. Neil v. Biggers, 409 U.S. 188, 193, n.3 (1972).

This court does not sanction the punishing of speech on less than a finding of a clear and present danger created by spoken words. Schenck v. United States, 249 U.S. 47, 52 (1919). The military courts agree that Schenck applies. United States v. Priest, 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338 (1972). Yet Dr. Levy's conviction was obtained under a "clear and reasonable tendency" test. This Court should make clear that its ruling that the "specialized society" of the military may control speech which in civilian life would be protected, 94 S.Ct. at 2563, did not sanction

a lowering of the clear and present danger proof standard and the requirement that such a danger be found by the triers of fact.

In the Fort Jackson Dermatology Clinic the danger of Dr. Levy's words was so "unpresent" and "unclear" that the Army allowed, indeed required, that he continue practicing medicine until the day his trial began. The court of appeals, however, in affirming the district court's erroneous factual finding improperly altered the standard for conviction for speech and deprived petitioner of the protection of the first amendment.

IV. Certiorari should be granted to establish constitutional standards for severance in prosecutions which include charges based on political statements and to determine whether the refusal to sever the order charge from the speech charges denied Dr. Levy a fair trial.

The joinder of the order charge and the pure speech charges prohibited a fair trial regardless of the constitutionality of the speech charges. The law officer refused to sever Charge 1 (the order charge) and the four pure speech charges. See e.g., Pointer v. United States, 151 U.S. 396, 403 (1894); Williams v. United States, 168 U.S. 382 (1897). There can be no doubt that the joinder of the four pure speech charges crippled the defense:

1. There were possible defenses to the order charge other than medical ethics and war crimes. For example, Dr. Levy might have pleaded that obedience to the order was impossible either due to the unwillingness of his patients to serve as observed guinea pigs or the inability of the students to absorb the knowledge or their unwillingness to abide by his rules. Five of the diseases listed in the order were veneral diseases, R. Vol. 4, p. 510; some diseases were rare, id., p. 508; some patients objected strenuously to being exposed to Special Forces Aidmen, R. Vol. 6, p. 1098. Despite any other reasons Dr. Levy had for not training them, if he could have testified he may have been able to establish that carrying out the order was impossible. And, most importantly, without the political content of the pure speech charges before them, the career officer jury might have disbelieved the order charge evidence or, if they believed that

evidence, sentenced him with leniency.

2. Dr. Levy was effectively deprived of the right to testify on his own behalf; had he taken the stand and testified about either the order charge or the pure speech charges or the two letter charges, he tacitly would have admitted guilt by his silence as to the other charge or charges. See the "anomalous situation" condemned in Stump v. Bennett, 398 F.2d 111, 120-21 (8th Cir.), cert. denied, 393 U.S. 1001 (1968), and cases there cited. See also Cross v. United States, 335 F.2d 987, 989 (D.C. Cir. 1964).

3. Had he risked the stand as to all charges or the pure speech charges or letter charges alone, his testimony regarding purely political matters and matters of national policy might have so infuriated his career-military jurors that his sentence would have escalated to the five year maximum on the order charge.

4. His refusal to train Special Forces Aidmen was not demonstrative of a scheme or design. To the rational mind exactly the opposite is the case. Had he desired to make Special Forces "disloyal" or "disaffectionate" he would have maintained at least a speaking acquaintance with them. As it was he refused to train them and thereby put them totally beyond the range of his voice. By joinder, Dr. Levy's right to testify and present a defense was unnecessarily and impermissibly burdened. Compare, United States v. Jackson, 390 U.S. 570 (1968).

The sole basis for the joinder was that the Manual for Courts-Martial, ¶¶ 30g, 36h (1969) provides for such joinder. But

even where a statute controls joinder of related offenses, the power of the Court to rule on the propriety of joinder continues. Williams v. United States, 168 U.S. 382 (1897). Severance here would not have been in any way inconsistent with the UCMJ and the Government made no claim that separate trials to accord with the federal rule would not have been practicable.

The general rule concerning consolidation of charges was established in Pointer v. United States, 151 U.S. 396, 403 (1894), where it was recognized as fundamental "...that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of charges embraced in one indictment and to be tried by one jury.... [Joinder of felonies is not automatically fatal but the] court is invested with such discretion as enables it to do justice between the government and the accused."

The four pure speech charges and the order charge did not involve the same witnesses or issues, a common plan or related offenses. Indeed no witness involved in the proof of Additional Charges II and III was in the remotest manner related to the proof of Charge II and Additional Charge I, let alone Charge I, the order charge. The prejudicial effect of the evidence offered under Additional Charges II and III -- charges involving an eight-page letter in which Dr. Levy's political philosophy was bared to the career-officer court members -- is incalculable.

As previously noted, joining the order charge to the pure speech charges permitted the Government to prove basically inconsistent factual situations. The law officer stated plainly that "the evidence

tending to show the disobedience of the order" was that Special Forces personnel were told by Dr. Levy "I'm not going to train you and the person went on his way. ... There was no additional presentation to that individual of the statements concerning our involvement in Viet Nam as I understand it." A. 480. Yet the speech charge evidence was that the statements were made to "divers personnel" which included Special Forces and "everybody to whom the statements were made." Id. Allowing the Government to prove two conflicting fact theories -- a refusal to train and be exposed to Special Forces personnel versus the desire to "subvert" them -- to prove separate crimes in one trial was error. Williams v. United States, supra; Pointer v. United States, supra.

The court of appeals majority noted that the inflammatory evidence most calculated to disturb the court-martial members was introduced under the Articles 133 and 134 charges, and most of this "would have been inadmissible under the Article 90 charge...." 478 F.2d at 798.1

Not only is there a "substantial possibility that [the] error may have infected

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1. See Wright, FEDERAL PRACTICE AND PROCEDURE, Criminal Vol. 1, § 141, p. 306, commenting on joinder:

> It is novel doctrine that the right of an accused to a fair trial can be balanced against competing considerations of efficiency.... It seems

(footnote continued on following page)

the verdict," Wardius v. Oregon, 412 U.S. 470, 479 (1973), but "there is present in this record abundant evidence of actual prejudice." Dickey v. Florida, 398 U.S. 30, 38 (1970).

(footnote continued from preceding page)

> strange indeed that one presumably innocent may be made to undergo something less than a fair trial, or that he may be prejudiced in his defense if the prejudice is not "substantial," merely to serve the convenience of the prosecution.

V. Certiorari should be granted to resolve important issues concerning the extent of application of the fifth and sixth amendments to military trials and military trial procedures.

A. While this Court has assumed in dicta that the sixth amendment right to trial by jury does not apply in the military, Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866); Ex Parte Quirin, 317 U.S. 1 (1942); O'Callahan v. Parker, 395 U.S. 258 (1969), it has consistently held military courts to minimum constitutional standards. Burns v. Wilson, 346 U.S. 137, 142 (1953):

> The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from violation of his constitutional rights.

Since Strauder v. West Virginia, 100 U.S. 303 (1880), the sixth amendment "impartial jury" requirement has applied to trials in most American courts. The prosecution conceded as much, R. Vol. 3, p. 165, and decisions of the Court of Military Appeals so provide. See United States v. Crawford, 15 U.S.C.M.A. 31, 35 C.M.R. 3, 6 (1964). But the effect of Article 25(d)(1) was to exclude from consideration for service on Dr. Levy's court enlisted men, non-career personnel and officers equal to or lower than he in rank. As for exclusion of women, Dr. Levy clearly established a prima facie case and it was error for the law officer to deny summarily the motion to quash. Whitus v. Georgia, 385 U.S. 545 (1967); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966)(three-judge court); Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973)(three-judge court)(regarding ex-

clusion of women from jury duty), prob. juris. noted sub nom. Edwards v. Healy, 415 U.S. 911 (1974).

The prejudice to Dr. Levy in an arbitrary and exclusive "jury" selection procedure was compounded by command influence and the absolute discretion of the convening authority to appoint the "best qualified" men to the panel.[1] Discretionary standards for juror selection may be facially constitutional, Turner v. Fouche, 396 U.S. 346 (1970), but this Court has consistently held that such discretion may not be exercised to insure non-representational juries. United States v. Mississippi, 380 U.S. 128 (1965); Avery v. Georgia, 345 U.S. 559 (1953); Williams v. Georgia, 349 U.S. 375 (1955). Dr. Levy's "jury" consisted of ten career officers, nine from the infantry and one from the artillery. They ranged in rank from major to colonel. Their average age was 41 years and, including time spent in military colleges, their average length of service was 19.3 years.[2] Four had served in Vietnam, one of them losing an eye there in a "friendly mine field."

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1. Article 25(d)(2), UCMJ provides: "When convening a court-martial the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament...."

2. Exh. C to the Petition for Habeas Corpus, p. 122.

Dr. Levy was faced by a "venire" selected by the General who ordered him court-martialed. His G-2 dossier was in the possession of one of the General's Colonels. His Article 32 investigation had been conducted by one of the General's Lieutenant Colonels. The military defense and prosecuting attorneys had been selected by the senior partner in the General's law firm -- the Staff Judge Advocate. The General's "corporate counsel" had other members of the "firm" draw up the charges; he reviewed the proceedings and gave his client post-trial recommendations regarding the trial and sentence. Then the General had the right to reverse the conviction or reduce the sentence.[1]

The problem of "command influence" has plagued the system of military justice both before and after the passage of the Uniform Code of Military Justice. See Reid v. Covert, 354 U.S. 1, 36 (1957); Note, Judicial Checks on Command Influence Under the Uniform Code of Military Justice, 63 YALE L.J. 880 (1954). Command influence in selection of court-martial members was regarded by

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1. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist, No. 47 (Hamilton, ed. 1880, quoting James Madison), as quoted in United States v. Brown, 381 U.S. 437, 443 (1965).

the principal author of the UCMJ, Professor Edmund M. Morgan, as pervasive, the protections inadequate, and the problem nearly insurmountable short of civilian control. Morgan, The Background of the Uniform Code of Military Justice, 6 VAND. L. REV. 169, 179, 183-84 (1953).

Any trial advocate would trade most procedural rights in the Bill of Rights for the right to choose the jury. In the military, it is the commander who chooses the jury, and who controls courts-martial through the explicit or implicit use of disciplinary powers and the power to build or destroy military careers through efficiency reports.

The members of a court-martial must personally feel that professional, social, and economic consequences to them may hinge on their decision. They know that the General would not have convened them in the first place unless he felt that the accused had done something wrong;[1] thus a finding of guilt cannot hurt, and probably will help, their careers.[2]

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1. "The convening authority may not refer a charge to a general court-martial unless he has found that the charge alleges an offense under this chapter and is warranted by evidence...." Art. 34(a), UCMJ (emphasis added).

2. This influence is certainly more pervasive than the mere "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial..." that will, on due process grounds, necessitate a change of venue. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

Not only should this Court determine whether military "jury" selection procedures are discriminatory but also whether their unfairness is enhanced because:

1. The "jury" may convict by a two-thirds vote.[1]

2. Each side has only one peremptory challenge.

3. Challenges for cause are heard and voted on by the challenged officer's fellow court members.

See p. 26, supra.

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1. This Court held in Apodaca v. Oregon, 406 U.S. 404 (1972), that majority verdicts in state criminal cases are not unconstitutional. But unanimity is required in federal criminal cases. Andres v. United States, 333 U.S. 740, 748 (1948); Patton v. United States, 281 U.S. 276 (1930). However, even Apodaca presupposes that non-unanimous juries represent a cross section of the community and are untouched by command influence. It thus has no precedential value here.

> As we said in Williams [v. Florida, 399 U.S. 78 (1970)], a jury will come to such a [fair] judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt. 406 U.S. at 410-11.

Article 41 procedures confronted Dr. Levy with another of the "'grisly', hard, Hobson's choice[s]" of Whitus v. Balkcom, 333 F.2d 496, 499 (5th Cir. 1964). Not only would the exercise of his one peremptory challenge create the risk of antagonizing his self-qualifying court-martial, but it would actually reduce the number of votes needed for conviction from seven to six. Had he exercised his permitted challenge to one of the ten court members, only six conviction votes (two-thirds of nine) would have been necessary. His right to a fair trial was to that extent denied.

B. This Court should decide whether the Article 32 investigation procedure was inherently unfair since the investigating officer, appointed by the convening authority, was subject to the same pervasive effect of command influence as the members of the court-martial and whether Dr. Levy was deprived of procedural fairness at a critical stage of the proceedings against him.[1] Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59 (1963).

In addition, although the Court of Military Appeals has held that there is no requirement that Article 32 investigations be open to the public, MacDonald v. Hodson, 19 U.S.C.M.A. 582, 42 C.M.R. 184 (1970),

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1. The Article 32 investigation both operates "as a discovery proceeding for the accused and stands as a bulwark against baseless charges." United States v. Samuels, 10 U.S.C.M.A. 206, 212, 27 C.M.R. 280, 286 (1959).

where an accused has waived any interest he may have in a private hearing, requests that the proceedings be public, and where no legitimate governmental interest in preventing disclosure of classified information is present, no justification for holding the Article 32 investigation in private exists.

C. This Court should examine the prosecutor's preferred role in the military justice system. In Dr. Levy's prosecution, the prosecutor served as clerk, bailiff, district attorney, sheriff, amicus, custodian, and special investigator, as he does in all courts-martial. See p. 28, supra.

Courts have implemented the right to a fair trial by purging the courtroom of inequality between prosecution and defense. In Dr. Levy's case, however, the prosecutor was entrusted with special duties which enhanced his status in the eyes of the court. His purely adversary functions acquired an increment of authority and to that extent facilitated conviction. Where the fairness of justice is involved, in fact as well as appearance, a showing of actual prejudice is not required. Avery v. Georgia, 345 U.S. 559 (1953).

D. This Court should determine whether the Staff Judge Advocate's court-martial role insures unfairness. Here he and his deputies performed above, beyond, and contrary even to the UCMJ's[1] call to duty.

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1. See, e.g., the disqualifications of Article 6(c), particularly as to an investigating officer thereafter acting as Staff Judge Advocate.

See p. 29, supra. To use the language of Pickering v. Board of Education, 391 U.S. 563, 578-79, n.2 (1968), the Judge Advocate's role was an "obvious defect...in the fact-finding process."

E. The standards for intra-military changes of venue should be established. Because of the trial atmosphere at Fort Jackson, Dr. Levy's request for a change of venue should have been granted. See p. 29, supra. In Groppi v. Wisconsin, 400 U.S. 505, 514 (1971), this Court held that changes of venue may be commanded upon proper showing even in misdemeanor cases: "unfairness anywhere, in small cases as well as in large, is abhorred, is to be ferreted out, and is to be eliminated." (Mr. Justice Blackmun, joined by Chief Justice Burger, concurring.)

There was a climate of prejudice at Fort Jackson. Under constitutional standards for changing venue, Dr. Levy was entitled to be tried elsewhere. See Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Turner v. Louisiana, 379 U.S. 466 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); Marshall v. United States, 360 U.S. 310 (1959). Cf. ABA Standards Relating to Fair Trial and Free Press, §§ 2.1, 3.2(c) (1968).

This Court should grant review to resolve important issues involving the extent of application of the fifth and sixth amendments' fair trial standards to the military.

VI. The Court should consider whether the affirmance by the court of appeals of the district court's review of petitioner's conviction (which was selective and procured because of his political beliefs and activities) has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a military court, as to call for further review and an exercise of this Court's power of supervision.

Dr. Levy showed the district court that he was treated unequally with other physicians at Fort Jackson. Exhibit C to Petition for Writ of Habeas Corpus, pp. 138-40. That someone may be quilty of proscribed conduct does not end all constitutional inquiry. Prosecution may be undertaken not to redress violations of the law but to supress unpopular ideas and individuals. United States v. McLeod, 385 F. 2d 734 (5th Cir. 1967), United States v. Leflore, 371 F. 2d 368 (5th Cir. 1967). Dr. Levy was prosecuted by a commander who thought he was a "Pinko" and after he had been investigated for having "some dealings" with Negroes. His refusal to train Special Forces Aidmen was no different from that of at least one other physician at Fort Jackson. The difference between them is apparent. Dr. Levy exercised constitutionally guaranteed rights in the then mutually unpopular local causes of being pro-Negro and anti-war. His fellow physicians had no interest in exercising these rights and they remained free.

Our Commanders-in-Chief and Secretaries of Defense and State long stated that a peaceful negotiated settlement in Vietnam was preferrable to total military victory. But sundry generals openly and publicly disagreed. Dr. Levy pointed this out to the law officer who said:

> Well, now, let's see if we can make this relevant here to these proceedings. Other people speak for the Army before service clubs and so on. R. Vol. 6, p. 2110.
>
> Well, I've talked, too, many times before, and they haven't court-martialed me. I wonder how we tie it into the specifics of the case? R. Vol. 6, p. 2111.

The fact that the Army prosecuted only those who expressed themselves at variance with the military's policy in Vietnam is precisely the point. Here they pursued the one officer at Fort Jackson, South Carolina, in the year of the Voting Rights Act of 1965 who, while off-duty and out-of-uniform participated in voter registration efforts. The released portions of the G-2 dossier are replete with racial references. Dr. Levy was termed disloyal by his superiors and was prosecuted for his political and racial views. If this Court is not satisfied that on this record their forbidden basis for his prosecution is clearly demonstrated then the Court should

exercise its power of supervision to allow Dr. Levy the opportunity to discover and present further proof.[1]

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1. See Yick Wo v. Hopkins, 118 U. S. 356, 373-74 (1886):

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court. . .

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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COUNSEL FOR PETITIONER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1917

HOWARD B. LEVY,

Appellant,

v.

JACOB J. PARKER, as Warden of the United States Penitentiary, Lewisburg, Pennsylvania, and STANLEY R. RESOR, as Secretary of the Army.

[Appellee.]

Appeal from the United States District Court for the Middle District of Pennsylvania

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Argued December 12, 1972

Before: SEITZ, Chief Judge, and ALDISERT and ROSENN, Circuit Judges.

JUDGMENT ORDER
ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

In our original opinion in this case, Levy v. Parker, 478 F.2d 772 (3d Cir. 1973), we considered appellant's contentions that Articles 133 and 134, U.C.M.J. were unconstitutionally vague and overbroad, and that appellant's Article 90, U.C.M.J. conviction was invalid because the commandant's order constituted participation in a war crime and was issued to punish. On June 19, 1974, the Supreme Court held that Articles 133 and 134 were not unconstitutionally vague or overbroad as to appellant and agreed that his Article 90 defenses were beyond our scope of review. Because we had not treated all the points raised by appellant, the Court remanded for our further consideration in the first instance.

After considering the remaining contentions raised by appellant, to-wit, that: (1) the rejection of truth as a defense to pure speech charges arising from comments on the conduct of the Vietnam war and war crimes resulted in the deprivation of First, Fourth, Fifth and Sixth Amendment rights; (2) the conviction violates the Due Process Clause of the Fifth Amendment since there was no evidence to prove the necessary elements of the pure speech charges; (3) the district court's finding that "the record supports a finding of a clear and present danger of creating the harmful results, with the requisite intent, as charged" erroneously

fails to recognize that this was not the standard of proof charged to the court and that "the harmful results as charged" were not shown to have existed; (4) the defense to the order charge that special forces aidmen were committing war crimes was erroneously voided by the law officer's 1967 ruling that there was no evidence of war crimes; (5) appellant's prosecution was selective and involved the unequal application of military law; (6) the refusal to sever the pure speech charge deprived appellant of a fair trial; (7) appellant's prosecution was barred by the pre-trial actions of the government's agents; (8) the district court erred in denying the motion for disclosure of information obtained by eavesdropping; (9) the district court erred in failing to require the disclosure of questionnaires prepared by the government; (10) the failure to disclose the entire G-2 Dossier to the defense was a violation of the First, Fourth, Fifth and Sixth Amendments; (11) the Military Justice System cannot provide a fair and impartial trial; (12) the Article 32 U.C.M.J. investigative procedure is unconstitutional; (13) the atmosphere at Fort Jackson required a change of venue; (14) the prosecutor as insider with preferred position must be eliminated; and (15) the Staff Judge Advocate's role insures unfairness, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

s/Aldisert
Circuit Judge

Attest:

s/Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: August 5, 1974

Certified as a true copy and issued in lieu of a formal mandate on August 27, 1974.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals for the Third Circuit

Howard B. Levy, Petitioner,

v.

Jacob J. Parker, as Warden, United States Penitentiary, Lewisburg, Pennsylvania, and Stanley R. Resor, as Secretary of the Army, Respondents.

No. 1057.

United States District Court,
M.D. Pennsylvania
Aug. 21, 1970.

SHERIDAN, Chief Judge.

In this habeas corpus action petitioner has filed motions to require disclosure of information obtained by eavesdropping, and for an order requiring respondents to produce and permit inspection of certain documents.

On June 2, 1967, while on active duty with the United States Army, petitioner was convicted of several violations of the Uniform Code of Military Justice, 10 U.S.C.A. § 801 et seq.[1]

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1. The violations can be summarized as follows:

Charge I. Article 90--Willful disobedience of a lawful order to establish and operate a Phase II Training Program for Special Forces Aidmen in dermatology.
[footnote continued to next page]

[footnote continued from preceding page]

Charge II. Article 134--Public uttering of statements, to enlisted personnel, which were disloyal to the United States, to the prejudice of good order and discipline in the armed forces, and with the design to promote disloyalty and disaffection among the troops. These statements related to the petitioner's opinions that the presence of the United States forces in Vietnam was wrong; that special forces troops were liars, thieves and murderers; and that "colored" soldiers should refuse to serve in Vietnam.

Additional Charge I. Article 133--Intemperate, defamatory, provoking, disloyal, contemptuous and disrespectful statements to enlisted personnel of the type set forth in Charge II.

Additional Charge II. Article 133--Conduct unbecoming an officer and gentleman by wrongfully and dishonorably communicating to a sergeant in Vietnam, with intent to impair and interfere with the performance of the sergeant's duty, petitioner's views on the evil of United States involvement in Vietnam, his views that the sergeant was helping those who suppress Negroes and poor whites in the United States to suppress the Vietnamese, and that petitioner would refuse to serve in Vietnam if assigned there.

Additional Charge III. Article 134--Advising, counseling, urging and attempting, with intent to interfere with, impair and influence the loyalty, morale and discipline of United States forces, to cause insubordination, disloyalty and refusal of duty by the sergeant referred to in Additional Charge II.

The court-martial returned a finding of a guilty of a lesser included offense in Additional Charges II and III by substituting in the specifications to both charges "culpable negligence" for "intent to impair and interfere with the performance of duty of a member of the military forces of the United States."

Prior to the imposition of sentence on Charges I and II and Additional Charge I, Additional Charges II and III were dismissed on motion of the Government because the findings were tantamount to findings of not guilty on those charges. On June 3, 1967, petitioner was sentenced, to be dismissed from the service, to forfeit all pay and allowances and to be confined at hard labor for three years. Petitioner exhausted military appellate review procedures, but the conviction and sentence were approved. Petitioner was confined to the United States Disciplinary Barracks, Fort Leavenworth, Kansas, and in February 1969, was transferred to the United States Penitentiary, Lewisburg, Pennsylvania. The petition for habeas corpus was filed on April 19, 1969.[2] Petitioner is currently free on bail.

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2. The district court, the Court of Appeals for the Third Circuit, and the Circuit Justice, Mr. Justice Brennan, denied bail. Subsequently, Mr. Justice Douglas directed the district court to release petitioner on bail [footnote continued to next page]

At the hearing on the motions, Government counsel represented that the Government did not have or obtain information by eavesdropping. Petitioner accepted this representation as given in good faith, but apparently had some reservations due to the large number of people connected with the case and the possibility that eavesdropping information might not have come to the attention of the Government counsel. The motion for disclosure of information obtained by eavesdropping will be denied without prejudice to renewal if and when it appears that the Government obtains information through eavesdropping.

The motion for production of documents relates to a G-2 dossier[3] compiled on petitioner by the United States Army Counterintelligence personnel, and approximately 450 questionnaires mailed by the Government to military and non-military patients of petitioner. It

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[footnote continued from preceding page]

pending final determination of the application for bail when the full Court convened. On August 5, 1969, petitioner was admitted to bail. He was scheduled to be released from prison on August 14, 1969. On October 13, 1969, the Supreme Court continued petitioner on bail.

3. The record refers to this dossier as a "G-2 dossier" or "intelligence dossier." The file in question is apparently more formally described as a United States Army Counterintelligence Records Facility file.

should be noted at the outset that petitioner did not request specific documents, but rather has demanded the entire dossier and all the questionnaires.

In Harris v. Nelson, 1969, 394 U.S. 286, 89 S. Ct. 1082, 22 L. Ed. 2d 281, the Supreme Court held that while the discovery provisions of the Federal Rules of Civil Procedure do not apply to habeas corpus proceedings, a "district court may, in an appropriate case, arrange for procedures which will allow development, for purposes of the hearing, of the facts relevant to disposition of a habeas corpus petition." The Court indicated that the nature and extent of permissible discovery is committed to the discretion of the district court, and furnished a general guideline for the courts to follow: "* * * [I]n exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elswhere [sic] in the 'usages and principles of law.'"(Footnote omitted.)

Turning first to the questionnaires, it appears that only 13 of the 450 persons contacted were called as witnesses at the court-martial proceedings. The questionnaires of these 13 witnesses were turned over to the chief defense counsel.[4] The Army refused to disclose

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4. At the court-martial, petitioner was represented by both civilian and military counsel. Chief defense counsel was Charles Morgan, Jr., Esq., who also represents petitioner in this habeas corpus action.

the contents of the remaining questionnaires on the basis that they were protected from disclosure by 18 U.S.C.A. § 3500, commonly known as the Jencks Act. Petitioner does not dispute that the Jencks Act principles may be applied in court-martial proceedings. United States v. Augenblick, 1969, 393 U.S. 348, 89 S. Ct. 528, 21 L. Ed. 2d 537. He states, however, that Augenblick recognized that "It may be that in some situations, denial of production of a Jencks Act type of a statement might be a denial * * *" of a constitutional right. Petitioner contends that the denial of access to the questionnaires deprives him of constitutional rights. He states "the defense sought these documents in order to demonstrate Dr. Levy's innocence of the four pure speech charges which were based upon his having made statements 'publicly' to 'divers' persons." It is apparently petitioner's contention that if the other 437 questionnaires did not show information which would support the charges, this would tend to refute the charges of "public" utterance to "divers" persons.

Petitioner has not specified the constitutional issue which he asserts is involved. At the argument, counsel argued only that aside from any question involving the Jencks Act, he was entitled to know what the Army's case was based on. Even under the rules applicable to ordinary criminal actions, a defendant is not entitled to inspection of the reports and statements of possible Government witnesses, except in accordance with the Jencks Act. Rule 16, Fed.R.Crim.P.; Peek v. United States, 9 Cir. 1963, 321 F.2d 934; Corbett v.

Patterson, D. Colo. 1967, 272 F. Supp. 602. Petitioner has not alleged an infraction of the Jencks Act. Here, as in Augenblick, supra, there is no indication that the questionnaires contained evidence favorable to the defendant.[5] Moreover, the names of the persons to whom the questionnaires were sent were taken from the patient book at the Dermatology Clinic. There is no suggestion that petitioner did not have access to this book to make his own investigation. If petitioner did not make certain statements to others than the 13 witnesses produced at the court-martial, this certainly would not negate the fact that he made the statements to the 13 witnesses, or that the utterances were "public" and made to "divers" persons. It is not "evidence favorable to defendant." In short, the procedure followed at the court-martial with respect to these questionnaires did not violate a constitutional mandate, or elevate the matter to a constitutional level, nor was there anything constitutionally unfair "where the barriers and safeguards are so relaxed or forgotten * * * that the proceeding is a mere spectacle * * * or trial by ordeal * * * than a disciplined contest." United States v. Augenblick, supra. It follows that since the questionnaires were properly denied the petitioner at the court-

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5. Cf. Brady v. Maryland, 1963, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215.

martial, provisions of Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act should also control this attempt at discovery in this habeas corpus proceeding. Harris v. Nelson, supra; cf. United States v. White, 4 Cir. 1965, 342 F. 2d 379; United States v. Kelly, 10 Cir. 1959, 269 F. 2d 448. Accordingly, respondent need not produce the questionnaires until such time as an evidentiary hearing is held and he produces a witness whose questionnaire would qualify for production under the Jencks Act.

Petitioner argues that the dossier contained information that petitioner, in his pre-service days, attended meetings of alleged subversive or communist groups, and that while in service petitioner engaged in off-duty, off-base political and civil rights activities consisting of Negro voter-registration drives in a South Carolina town; that the Army counterintelligence agent, allegedly himself a racist, who played a role in the compilation of the dossier, lived in that town; that Colonel Fancy, petitioner's commanding officer, intended to prefer charges against petitioner under Article 15 of the Uniform Code of Military Justice,[6] Commanding Officers Non-Judicial Punishment, for disobeying an order to train special forces troops in dermatology, the punishment for which is minor; that the agent showed Colonel

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6. 10 U.S.C.A. § 815.

Fancy the complete dossier which included petitioner's political and civil rights views and activities; that as a result of the information in the dossier, Colonel Fancy raised the charges to general court-martial status, the punishment for which is severe; and that the court-martial proceedings were, therefore, a plot by the agent, Colonel Fancy and others to punish petitioner not for disobedience of the order, but for his political and racial views.

At the court-martial, petitioner was given 80 pages of the 180-page dossier, but the remainder was held not to be Jencks Act material. Also some of the pages contained classified security information. Subsequently, the law officer[7] stated that information in the remaining 100 pages was irrelevant but permitted military defense counsel, assistant counsel in the proceeding, to review the dossier to determine the relevancy of the remaining pages. Military defense counsel advised the chief civilian defense counsel[8] that the remainder of the dossier was irrelevant, but he was not permitted to inform chief civilian counsel of the contents. The entire file was also reviewed by the

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7. Equivalent to a trial judge. 10 U.S.C.A. § 826; Juhl v. United States, 1967, 383 F.2d 1009, 181 Ct. Cl. 210.

8. See note 2, supra.

law officer, in camera, and he determined that nothing in the withheld material was relevant to the proceedings. Petitioner states he demanded and now demands the entire dossier on the constitutional grounds that the dossier was used to prefer charges to punish him for his political beliefs contrary to the freedom of speech provisions of the first amendment; that the prohibition of military defense counsel from revealing the contents of the dossier to chief defense counsel results in a lack of due process of law under the fifth amendment; and that denial of access to the dossier to chief defense counsel deprived petitioner of effective assistance of counsel contrary to the sixth amendment.[9]

We are only concerned with the application of the Jencks Act to a quasi-criminal proceeding, unless the Constitution requires production of materials which are outside the scope of the Act. United States v. Augenblick, supra, citing the concurring opinion of Mr. Justice Brennan in Palermo v. United States, 1959, 360 U. S. 343, 79 S. Ct. 1217, 3 L. Ed. 2d 1287. With respect to the first amendment claim, petitioner states:

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9. Petitioner apparently also contended that to the extent that the dossier may contain eavesdropping information, this violated his fourth amendment rights. This contention has apparently been put to rest with the Government's representation that it obtained no information by eavesdropping.

"The G-2 Dossier's production could have resulted in voiding petitioner's conviction on at least any of the following grounds:

1. If it disclosed that the escalation of the charges to general court-martial status was based upon Dr. Levy's political views; or,

2. If it disclosed that the escalation of the charges to general court-martial status was based upon Dr. Levy's off-base out-of-uniform political or civil rights activities; or,

3. If information concerning his pre-service political activity was included therein; Cf. Harmon v. Brucker, 335 U.S. 579 [78 S. Ct. 433, 2 L. Ed. 2d 503] (sic) (1958); * * *."10

Petitioner claims that these documents "could" have resulted in avoiding the conviction. He cites no authority for the first two of the three grounds. The Harmon case does not support petitioner's categorical statement that if the file included information concerning pre-induction activity, the conviction could be upset. In Harmon, the Army discharged two soldiers, issuing them certificates other than "honorable," based in part on their pre-induction activities rather than exclusively upon their military records. In deciding that this was improper, the Court held

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10. Citation is 355 U.S. 579.

that under the applicable statutes a discharge other than honorable must be determined solely by the soldier's military record. No constitutional question was involved. Even if petitioner's dossier disclosed pre-service activities, the charges were based on petitioner's statements and actions while a member of the military service and not on his pre-service activities. And, as far as can be determined, the court-martial proceedings took into account evidence relating to these charges and not to pre-service political activities.

Petitioner contends that if the file disclosed the reason for bringing the charges was his political and civil rights views, his conviction could be overturned. No authority is cited for this proposition, and Harmon does not support it because the record in that case left no doubt that matters outside the soldiers' military record were considered, and the question was whether this was permissible under the statute. The Army does not admit that these pre-service and outside activities played any role in petitioner's case.

In the memorandum submitted with the answer to the rule to show cause issued in this case, the respondent admits that Colonel Fancy was moved to elevate the charges after reviewing the dossier. He testified he did so on the basis of sworn statements which contained information which he did not have at the time he preferred the Article 15 charges and which he concluded "added to the case":

> "'A. I felt as a result of his (sic) review that the dossier did contain sworn statements which added to the case and I decided that the Court-Martial proceedings would be more appropriate than an Article 15 proceeding. R. 260.'"

In its memorandum submitted in connection with the motion, respondent represents, and petitioner does not deny, that the sworn statements indicated that petitioner had willfully disobeyed an order[11] and that these statements were released to petitioner. Thus, petitioner received the statements in the dossier which motivated Colonel Fancy to elevate the charge.

It has never been the law that a defendant may have free access to an investigative file. He may have access to information under the Jencks Act, Rosenberg v. United States, 1959, 360 U.S. 367, 79 S. Ct. 1231, 3 L. Ed. 2d 1304, and to information which constitutional principles require to be turned over. Palermo v. United States, supra. Petitioner had not cited any infraction of the Jencks Act, and the present record does not spell out a constitutional mandate which would permit petitioner to have unlimited access to the Army's investigative file.

If the Army were required to turn over only Jencks Act material, then petitioner was not denied effective

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11. As opposed to neglect to perform duty.

assistance of counsel when the Army turned over the entire file to the defense, albeit in a limited way. It could have insisted on a strict application of the Jencks Act, and of the in camera inspection procedure provided for statements covered by the Act, Palermo v. United States, supra. Instead, it permitted military assistant defense counsel to review the file and to request any document deemed relevant. No request was made. Petitioner points to Alderman v. United States, 1969, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176, as rejecting in camera inspection procedure. That case did not involve Jencks' type statements, but, rather, the exclusionary rule fashioned under the fourth amendment with respect to eavesdropping and its fruits. Here it has been affirmatively represented that the file contains no eavesdropping information. In Alderman, the Government admitted that it had eavesdropping information and the Court rejected in camera inspection because of the volume and type of the material to be examined. It stated in Note 14 on page 182, 89 S. Ct. on page 971:

"[14]In both the volume of the material to be examined and the complexity and difficulty of the judgments involved, cases involving electronic surveillance will probably differ markedly from those situations in the criminal law where in camera procedures have been found acceptable to some extent. Dennis v. United States, 384 U.S. 855, [, 86 S.Ct. 1840, 16 L. Ed. 2d 973] (1966) (disclosure of grand jury minutes subject to in camera deletion of 'extraneous material'); Palermo v. United

States, 360 U.S. 343, 354, 79 S. Ct. 1217, 1225 [3 L. Ed. 2d 1287 (1959) (whether the Jencks Act, 18 U.S.C. § 3500, requires disclosure of document to the defense); Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639] (1957) (disclosure of informant's identity). * * *"

Viewed in this light, the restrictions placed upon military assistant defense counsel do not amount to a denial of due process.

Petitioner argues that although he requested that the dossier, sealed if necessary, be made part of the record for appellate purposes, this was not done. Even under the Jencks Act if a court refuses inspection of all or part of a statement, the statement need only be preserved by the United States to be made available if defendant appeals. Here, the requests go to the entire dossier, and not to a Jencks' type statement. Petitioner appealed to the Army Board of Review. Since petitioner requested the entire dossier, the Board had before it only the question of whether petitioner had demonstrated his right to the dossier as a matter of law, and not whether a specific document was improperly withheld. It found no violation of constitutional rights:

"The claims of appellant that his civilian attorney could not peruse the complete 'G-2 Dossier' [footnote: The major portion of this file was released to appellant. Some documents were not but were examined by military defense counsel and the law officer in camera to determine their inapplicability to the trial. Defense disclaimed the

application of the Jencks Act, 18 U.S.C. 3500.] and that his conviction violates constitutional prohibitions against bills of attainder and ex post facto laws as well as the remaining assigned errors do not warrant any summarization or discussion. Compendium, 37."

Petitioner complains of this "cavalier" disposition of the claim. In United States ex rel. Thompson v. Parker, 3 Cir. 1968, 399 F. 2d 774, the court said, "we are aware of no requirement that appellate courts, military or otherwise, must discuss in detail each and every contention--no matter how specious--of every appellant."

Finally, petitioner argues that without the dossier he was faced with a "grisly 'Hobson's Choice'" of whether to take the witness stand in his own defense, knowing that the prosecutor had access to a dossier which contained matters so damaging and so important to the accuser that he elevated the charges to general court-martial status. The answer to this is two-fold. Every defendant in any criminal trial must make this same choice; and regardless of the matter of choice, Colonel Fancy testified to the reasons for elevation of the charges, and the documents on which the elevation was based were released to petitioner.

Historically discovery has been restricted in criminal cases. In Developments in the Law--Discovery, 74 Harv. L. Rev. 940, 1052 (1961), it is stated:

"Traditionally, the narrow scope of

discovery in criminal litigation is justified by three considerations which are said to be peculiar to criminal law. First, there has been a fear that broad disclosure of the essentials of the prosecution's case would result in perjury and manufactured evidence. Second, it is supposed that revealing the identity of confidential government informants would create the opportunity for intimidation of prospective witnesses and would discourage the giving of information to the government. Finally, it is argued that since the self-incrimination privilege would effectively block any attempts to discover from the defendant, he would retain the opportunity to surprise the prosecution whereas the state would be unable to obtain additional facts. This procedural advantage over the prosecution is thought to be undesirable in light of the defendant's existing advantages. The validity of each of these objections must be appraised in each of the situations in which the defendant may seek discovery and must be weighed against the importance to the defendant of the disclosure."

While this habeas corpus action is technically civil in nature, nevertheless, the court is requested to review certain aspects of a court-martial proceeding with criminal sanctions. On the present record, there is nothing but petitioner's speculation that the dossier "might" contain something out of which he may be able to construct an argument that constitutional rights have been violated. In a review of court-martial proceedings, the court need only determine whether the military courts have given due con-

sideration to petitioner's contentions. United States ex rel. Thompson v. Parker, supra.

The motions will be denied.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

No. 1057 Habeas Corpus

Howard B. Levy, Petitioner

v.

Jacob J. Parker, as Warden, United States Penitentiary, Lewisburg, Pennsylvania, and Stanley R. Resor, as Secretary of the Army, Respondents.

MEMORANDUM

Petitioner's petition for a writ of habeas corpus is before the court.

A summary of the background of this proceeding is set forth in the opinion denying petitioner's motions for disclosure of information obtained by eavesdropping, and for an order to produce and permit inspection of 437 questionnaires and for 100 pages of a 180-page investigative file (G-2 dossier) which petitioner had been denied permission to review during Army court martial proceedings. Levy v. Parker, M.D. Pa. 1970, 316 F. Supp. 473.

Prior to the final hearing on the petition, petitioner filed an application for reconsideration of the denial of the motion for production of documents.

This application was based "on the ground newly discovered evidence regarding military surveillance of civilian organizations and activities as disclosed by Robert F. Froehlke, Assistant Secretary of Defense, to the Subcommittee on Constitutional Rights of the Senate Judiciary Committee and released on March 2, 1971 (attached hereto as Exhibit B) and the disclosure of the Department of the Army's Civil Disturbance Information Collection Plan, 117 Cong. Rec. S2290 (daily ed. March 2, 1971) (attached hereto as Exhibit C)." These documents show that the military service engaged in extensive surveillance of civilian activities during the civil disturbance of the 1960's. Apparently petitioner believes that he may have been one of those upon whom surveillance was conducted during his pre-service or off-duty political activities. At the final hearing counsel for the respondents reiterated the Army's previous representation that it has no information concerning defendant, which was obtained by eavesdropping, and states in his brief that "respondent denies any knowledge whatsoever concerning any alleged surveillance by agents of the United States respecting petitioner at any time pertinent to his conviction that was not contained in the Army counter-intelligence file examined by petitioner's military counsel and in camera by the law officer at the trial." The application for reconsideration will be denied.

At the hearing the parties did not offer any evidence but rested on the voluminous records filed with the petition. The hearing on the petition, therefore, was limited to the arguments of counsel.

Petitioner contends that his statements, letters and political activities giving rise to the speech charges were absolutely protected by the first amendment; and that, if not absolutely protected, they did not constitute a clear and present danger of creating disloyalty and disaffection among the troops, and impairing the loyalty, discipline and morale of the Armed Forces. Petitioner also contends that the issuance of the order to train special forces troops in dermatology, which petitioner disobeyed, and the elevation of charges to general court martial was a plot by Colonel Fancy, Agent West and others to punish him for his political views and activities, and his racial views.

The cases are legion which hold that first amendment rights and other constitutional rights are not absolute when they conflict with the protection of the common good of the people of the United States. It is clear from the record that petitioner's first amendment rights were not absolute. It is also clear that the record supports a finding of a clear and present danger of creating the harmful results, with the requisite intent,

as charged in the court martial proceedings, and that the record does not support petitioner's assertions that the proceedings, and their elevation to general court martial grew out of a plot to "get" him for his speech, pre-service and political activities. In any case, the military tribunals have given fair consideration to petitioner's contentions. It is not proper for this court to reweigh each item of evidence. United States ex rel. Thompson v. Parker, 3 Cir. 1969, 399 F.2d 774:

"Appellant next contends that the district court erred by relying upon the Supreme Court's decision in Burns v. Wilson, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953), for its holding that a district court's scope of review of proceedings in the military courts is limited to the question of whether or not the military tribunals gave due consideration to the petitioner's constitutional claims. In Burns, supra, the petitioners were found guilty by a court-martial of murder and rape and sentenced to death. After exhausting all military remedies, petitioners applied to a Federal district court for writs of habeas corpus, alleging that they had been denied due process of law, that they been illegally detained, that coerced confessions had been extracted and that they had been denied effective representation by counsel. The district court, after satisfying itself that the military had

complete jurisdiction, dismissed the applications without hearing evidence and without further review. On appeal, the Court of Appeals for the District of Columbia fully considered petitioners' allegations on their merits, reviewed the evidence in the record of the trial and other proceedings before the military courts, and affirmed. Burns v. Lovett, 91 U.S.App.D.C. 208, 202 F.2d 335 (C.A. D.C., 1952). Thereafter, the Supreme Court granted certiorari and affirmed the judgment of the court of appeals, but made it quite clear that it did not approve that court's procedure of 'reweighing each item of relevant evidence in the trial record,' especially since it was apparent from the records in the case that the military courts gave fair consideration to each of petitioners' claims.

"To correct any possible misunderstanding among the Federal courts as to the proper procedure to be followed in military habeas corpus cases, Mr. Chief Justice Vinson, in Burns, enunciated the following guideline:

> ' " * * * Congress has provided that these determinations [fair determinations of military tribunals] are "final" and "binding" upon all courts. We have held before that this does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner. Gusik v. Schilder, 340 U.S. 128, [71 S.Ct.

149, 95 L.Ed. 146] (1950). But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. Whelchel v. McDonald, 340 U.S. 122, [71 S.Ct. 146, 95 L.Ed. 141] (1950)."' 346 U.S. at 142, 73 S.Ct. at 1049.

"We have already held in this opinion that the military courts dealt fully and fairly with the instant petitioner's constitutional claims. Under the principle announced in Burns, therefore, the district court, after determining that the military courts had given due consideration to petitioner's contentions, quite correctly refused to review and re-evaluate the facts surrounding petitioner's allegations. As noted by the district court in Swisher v. United States, 237 F.Supp. 921, at 928 (W.D. Mo. 1965), aff'd, 354 F.2d 472 (C.A. 8, 1966), 'Burns is the law of the land.' And both this court and the district court must abide by its teaching." (Footnote omitted.)

The various articles of the Uniform Code of Military Justice are not unconstitutional for vagueness. United States v. Howe, 1967, 17 U.S.C.M.A. 165, 37 C.M.R. 429; United States v. Sadinsky, 1964, 14 U.S.C.M.A. 563, 34 C.M.R. 343; United States v. Frantz, 1953, 2 U.S.C.M.A. 161, 7 C.M.R. 37.

The petition for a writ of habeas corpus will be denied.

s/Michael H. Sheridan
Chief Judge
Middle District of
Pennsylvania

Dated: June 30, 1971.